IN THE

Supreme Court of the United States

OCTOBER TERM 1975

NO. 75-1080

PETER FRANKLIN — *Petitioner*

V.

EDGAR R. LEVY CO.,
THOMAS SHORTMAN
President, Local 32B AFL-CIO, — *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT COURT

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The case was in the Court of Appeals upon an appeal from an order dismissing the case entered in the United States District Court of New York, or more appropriate for the lack of perfecting an appeal by five learned attorneys.

To the Honorable Chief Justice and the Associate Justices of the United States.

I would like to apologize to you for standing before you prose. Upon careful review the court will see that I had no other alternative but to come before you in this manner.

The affidavit of both, respondents, Arnold R. Streit, Attorney for Local 32b and the Attorney for Edgar R. Levy, are in the same parallel of frivolousness. I shall deal solely with Attorney Arnold Streit, defendant attorney for Local 32B, affadavit.

The complaint fails to state a claim as of defendant Local 32B upon which relief could be granted.

The courts had no jurisdiction over matter of subject action.

Upon the grounds that the cause of action alledged in the complaint had already been adjudicated and that the plaintiff is estopped from suing thereon again.

Petitioner complaint was drawn on the Labor Management Act of 1947 as ammended by public law 86-257 in 1959.

Sec. 102, 301, and 303 did state a case where relief could be granted. That section declares that anyone may sue the Union for damages if their rights under this act have been infringed upon by unfair labor practices, may institute an action in the United States District Court. I did claim that the union had committed unfair labor practices against me and that clearly stated a case and the District Court did have jurisdiction in the instant case.

As adjudicated and stated in respondents affadavit, there was an arbitration award on October 30, 1968. The arbitrator in that case acted partial to the union and my employer. He also was guilty of misconduct in that he refused to hear "pertinent and material" evidence. I firmly believe that this in itself constitutes sufficient grounds for this court to take jurisdiction and set aside the arbitration award. Even the United States Arbitration Act section provides that this is sufficient grounds for invalidating an arbitration award. See also, Commercial Building Agreement, Local 32B, AFL-CIO, Article VII, paragraph (4) which affords me recourse to Judicial review for relief from an arbitration award. That is called contract. Drawn up and worded part and parcel by both respondents, Local 32b and Reality Advisory Board known initially as R.A.B.

The arbitrator shall have the power to award appropriate remedies. The award being final and binding upon the parties

and the employee or employees, employers or employer, involved. Nothing herein shall be construed to forbid either party from resorting to court for relief from or to enforce rights under any award. In any proceeding to confirm and award of the arbitrator.

In affidavit of defendent union concerning the National Labor Relation Act (2) are matters completely within the jurisdiction of the National Labor Relations Board and over which the District Courts may not assert jurisdiction; and, in any event, that the matters have been finally adjudicated before the body having jurisdiction, the National Labor Relations Board.

Petitioner over the jurisdiction of the board plaintiff clearly stated.

Section 701 (a) Sec. 14 of the National Labor Relations Act (29 USC 164) as ammended, is ammended by adding at the end thereof, the following new subsection:

"(c) (1)-(2) Let nothing bar or prevent federal or state jurisdiction from assuming and asserting jurisdiction over labor disputes of any class or category of employers over which the board has declined to assert jurisdiction." It's clearly shown by attached material of both defendent union, marked Exhibit B that the board did decline to lodge a complaint over which it did have exclusive jurisdiction.

In affidavit of defense Attorney Arnold Streit to the extent that the complaint proposes to allege harrassment and physical assault, since diversity of citizenship is not alledged, the court does not have jurisdiction.

Petitioner clearly states that nothing in the ammended act requires proof of citizenship.

On face value the best that could be said of both respondent affidavits could only be interpreted as frivolous and no harm to petitioners cause of action.

Parsuant to presentation of law and suggestion of law, Plaintiff honestly believes that he clearly presented a case. If so, legally and morally the District Court was in error in arbitrarily and capriciousness dismissing petitioners cause of action

That proposes another question and it answers itself as to why through five different learned attorneys from the Harlem Assertion of Rights and Community Law Offices, out of a firm that has 30-35 lawyers, each neglect or fail to properly perfect an appeal within five years. Five different complaints in the bar association did not move either of these attorneys to morally, ethically and legally arise to the responsibility that they were duty bound to in this case.

Petitioner refers back to District Court each and every item was orally stated to District Court judge. The District Court judge stated that if that was the case, and it was, that petitioner could not try his own case. He had to rely upon Mr. Carl Callendar who was already in court to take over responsibility from that point on. Six months later the District Court judge dismissed complaint on grounds the court lacked jurisdiction over the subject matter.

From the indecision going on between the director at that time, whether or not to continue with petitioner's complaint, petitioner pointed out that their moral and legal obligation of the Harlem Assertion of Rights was bound by orders of the District Court judge. Harlem Assertion of Rights did, after petitioner filed notice of appeal, assign Attorney Aurther McNaught to successfully perfect and appeal.

The Appeal Court asked for a brief appendix. Thereafter, the appeal court held the case open and in limbo to 1972. By that time, and as of the time the case was dismissed from the calendar, the case was assigned to Attorney John Draghi.

Petitioner lodged another complaint in the Bar Association, and the Community Law Services director Attorney Carl Callendar assigned and put in charge another attorney, namely Mrs. Paula Williams. Still none perfected an appeal. Upon reading a decision of this court allowing an individual to handle his own case. plaintiff proceeded to ask the Appeal Court to reinstore his original case or to give him five minutes to orally state why his case should be reinstated, and was abruptly denied. In absence of any legal barriers including limitations, petitioner is awed by why the Appeal Court abruptly denied petitioner's request to restore or show cause why the Appeal Court took that position. If this court would review two pieces of legal material placed before the court and the attached material namely the Restore Motion, dated July 29, 1975 and four pieces of attached material. The brief in support placed before the court dated September 22, 1975, said enough.

Petitioner can only refer back to one other case where defendent union did violate every known unethical, illegal, and in a criminal manner. All of these acts happened in the Supreme Court of New York. In that particular case petitioner paid three hundred dollars to an attorney named Semond Paul Sherman and as the case progressed the defendent union did bring pressure on said lawyer to remove himsel from further representing petitioner. He placed a motion before the Honorable Justice Birdie Amsterdam. Upon the judge receiving the case, she denied his motion and stated that I had paid him three hundred dollars to fully represent me and she expected him to do so. One month later this same attorney put in another motion asking to be relieved from said case. This time he stood before Judge Saul Streit and Judge Streit did allow attorney to leave that case. For lack of not being able to find another attorney who was willing to represent me against this powerful union, plaintiff proceeded to handle his own case.

Through months and months of frivolous motions, one after the other, plaintiff finally stood in front of Justice Fine and he

marked the case ready to be heard. One month later the case was again placed on the ready calendar. This time we stood in front of Justice Gold.The attorney for the union asked for a continuance of three months. Judge Gold denied their request and he stated that the case had been in court long enough. He set tht trial date and signed all subpoenas and assigned a judge to hear the case. Judge William Heck was to hear the case but when the trial date came there was no trial to be heard. I was told by the calendar clerk that the case had been thrown out. There after I hired Attorney Paul Zubar. I gave him one hundred dollars to find out how and why this could happen. Mr. Zubar pocketed my hundred dollars and did nothing. I lodged a complaint to the Bar Association but to no avail. I merely mentioned this case to show the similarities in the two cases.

In the light and absence of any legal means and harm done to my orinigal course of action, if the appeal was properly perfected nothing herein would have prevented the Appeal Courts from turning this case around. Faced with the original frivolous motion and fully aware of no harm done, their only recourse was to bring their power to bear, to force all five lawyers refuse to perfect an appeal with express purpose of placing this case out of reach of the court.

In absence of any legal barriers presented by either respondents and the appeal court denial. Since instances surrounding the attorneys acts for neglect with purpose of denying plaintiff due process of the law.

In conclusion, petitioner prays for this courts full review or an order restoring this case to the calendar.

Respectfully yours,
Peter Franklin

MEMORANDUM

HERLANDS, District Judge:

By these motions defendants union and employer seek to dismiss the within complaint under Rule 12 (b) of the Federal Rules of Civil Procedure, for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted.

Plaintiff, appearing *pro se*, has captioned his complaint as an "Unfair Labor Practice". He charges that defendant employer terminated his employment because of his activities against the union, and that the union and its agents have harassed and assaulted him, and caused the employer to discharge him because of his anti-union activities. The complaint specifically invokes sections 7 and 8 of the National Labor Relations Act, as amended, 29 U.S.C. SS157, 158 (1964). Plaintiff seeks reinstatement, back pay and damages.

The subject matter of this complaint, as it is presently pleaded, relates only to the alleged commission of unfair labor practices by the union and the employer. This Court lacks subject matter jurisdiction over such claims, which are properly presented only to the National Labor Relations Board. *See, e.g., San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959).

Plaintiff, by way of affidavits and memoranda of law, has led this Court to understand that the claim he is attempting to plead is not limited to the unfair labor practices briefly outlined in his complaint. More specifically, plaintiff is apparently charging that the employer and union conspired to terminate his employement and that the arbitrator's decision sustaining his discharge was fraudulently procured, and, consequently, that this court has jurisdiction under section 301 of the Labor Management Relations Act, as amended, 29 U.S.C. S185 (1964) to inquire into whether the employer breached the collective bargaining contract, and whether the union breached its duty of fair representation. In a properly pleaded case, this Court would have jurisdiction despite the fact that recovery may rest on proof of unfair labor practices by the employer and/or union. *See Vaca v. Sipes,* 386 U.S. 171 (1967).

Plaintiff cannot rely on affidavits or memoranda of law to plead a claim. A brief statement of the facts upon which the court's jurisdiction depends and upon which relief may be granted must be set forth in the body of the complaint. Fed. R. Civ. P. 8 (a). The complaint herein fails to meet these standards.

The complaint is hereby dismissed as against both defendants for lack of subject matter jurisdiction.

So ordered.

Dated: New York, N. Y.
June 23, 1969.

William B. Herlands
U. S. D. J.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Twelfth day of June, one thousand nine hundred and Seventy-two.

The action having been docketed herein, but no brief for the appellant and no stipulation extending the time for such filling having been filed within nine months of the docketing of the appeal.

It is hereby ordered that the appeal be and it hereby is dismissed pursuant to Rule S 0.18 (7) of the rules of this court supplementing the Federal Rules of Appellate Procedure.

Aug. 10, 11:20 A. M. 1972

A. DANIEL FUSARO, *Clerk*

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of October, one thousand nine hundred and seventy-five.

A motion having been made herein by Appellant *pro se* for reinstatement of the appeal.

Upon consideration thereof, it is ordered that said motion be and it hereby is denied.

October 7, 1975

Sterry R. Waterman
James L. Oakes
Thomas J. Meskill

75-1080

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. A-604

PETER FRANKLIN,

Petitioner,

- against -

EDGAR A. LEVY COMPANY, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ISRAELSON & STREIT
Attorneys for Respondent,
Thomas Shortman
521 Fifth Avenue
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. A-604

PETER FRANKLIN, Petitioner,

- against -

EDGAR A. LEVY COMPANY, et al., Respondents

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent, John J. Sweeney, President, Local 32B, Service Employees International Union, AFL-CIO, and successor to the late Thomas Shortman, prays that petitioner's request for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on October 7, 1975 be denied.

STATUTORY PROVISIONS AND RULES

Respondent believes that the following statutes and rules are applicable rather than those suggested by petitioner. Federal Rules of Appellate Procedure, Rules 26(b) and 31(a); Rules Relating to the Organization of the Court of Appeals for the Second Circuit, § 0.18. The text of these Rules is set forth in the Appendix, Pages 1 to 3.

QUESTION PRESENTED

Respondent believes that the following question is presented rather than those suggested by petitioner:

> Did the Court of Appeals correctly adjudge that an appeal by the petitioner filed on July 2, 1969, from a judgment of the United States District Court for the Southern District of New York, entered on June 23, 1969, should be dismissed?

STATEMENT OF CASE

In November, 1968, petitioner commenced an action in the United States District Court for the Southern District of New York against respondent, Thomas Shortman, as President of Local 32B, a labor organization; and Edgar A. Levy Company, a corporation doing business in the City of New York. Petitioner alleged that Edgar A. Levy Company terminated the employment of petitioner on August 21, 1968, without just cause, and that said termination was effected at the request of Local 32B. Respondent Shortman and respondent Edgar A. Levy Company moved to dismiss the complaint and the motions were granted by Judge Herlands in a judgment entered June 23, 1969; notice of appeal to the Circuit Court of Appeals for the Second Circuit from said judgment of June 23, 1969, was filed on July 2, 1969. The record was filed and the appeal was docketed in the

Court of Appeals for the Second Circuit on August 8, 1969.

On June 12, 1972, the Court of Appeals for the Second Circuit dismissed the appeal of petitioner pursuant to Rule §0.18 (7) of the rules of the Court of Appeals for the Second Circuit. The text of the said rule is set forth in the Appendix annexed hereto. That Court, in its order dismissing petitioner's appeal, indicated that no brief had been filed nor had any stipulation extending the time for such filing been filed within nine months of the docketing of petitioner's appeal.

In August, 1975,petitioner, pro se, in an undated and unsworn statement moved the Court of Appeals for the Second Circuit to restore the appeal which had been dismissed two years and ten months previously. On October 7, 1975, the Court of Appeals for the Second Circuit filed an order denying said motion.

REASONS FOR DENIAL OF THE WRIT

POINT I

THE COURT OF APPEALS CORRECTLY DISMISSED THE APPEAL ON ITS OWN MOTION

The notice of appeal to the Circuit Court of Appeals was filed on July 2, 1969, and the appeal was docketed on August 8, 1969. No brief was filed in the Court of Appeals, and, accordingly, that Court dismissed the appeal two years and ten months after it had been docketed.

Petitioner in his petition for a writ of certiorari dated October 15, 1975, complains at great length about certain attorneys who represented him at various stages of his action. He states on page 4 of his petition that none of these various attorneys "perfected the appeal" and, accordingly, his appeal was dismissed by the Court of Appeals almost three years after it had been docketed. This argument which seeks to imply that peti-

tioner was the victim of certain attorneys' neglect cannot withstand examination as to the length of delay between the Order of Dismissal by the Circuit Court of Appeals and petitioner's attempt to restore the appeal to that Court's calendar. More than three years elapsed between that order and petitioner's appeal for restoration to the Circuit Court of Appeals.

Federal Rules of Appellate Procedure, Rule 26(b) permits an appellant, on good cause shown, to seek an extension of time in which to do an act required by the said Rules. Rule 31(a) clearly requires that the appellant file his brief within forty days after the date onwhich the record is filed with the Court of Appeals. Rule § 0.18(7) of the Rules Relating to the Organization of the Court of Appeals for the

Second Circuit states that the Clerk of the Circuit Court of Appeals, unless otherwise directed, shall enter an order dismissing the appeal in a case where a brief for the appellant has not been filed within nine months of docketing of the appeal and no stipulation extending the time for filing has been filed. Such an order was entered on June 12, 1972. More than three years later, petitioner, pro se, requested the Circuit Court to "restore" the matter to its calendar.

CONCLUSION

Respondent respectfully requests that petitioner's petition for a writ of certiorari to the United States Court of Appeals for the Second

Circuit be denied.

Respectfully submitted,

Harold F. Berg

Harold F. Berg
Attorney for Respondent
521 Fifth Avenue
New York, New York 10017

Counsel:

Harold F. Berg
Arnold R. Streit

A P P E N D I X

FEDERAL RULES OF APPELLATE PROCEDURE for the United States Court of Appeals

Rule 26. COMPUTATION AND EXTENSION OF TIME.

(b) ENLARGEMENT OF TIME. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of

the United States, except as specifically authorized by law.

Rule 31. FILING AND SERVICE OF BRIEFS.

(a) TIME FOR SERVING AND FILING BRIEFS. The appellant shall serve and file his brief within 40 days after the date on which the record is filed. The appellee shall serve and file his brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for

classes of cases, or by order for specific cases.

UNITED STATES
COURT OF APPEALS
For The
SECOND CIRCUIT

PART I-RULES RELATING TO THE ORGANIZATION OF THE COURT

§ 0.18. ENTRY OF ORDERS BY THE CLERK

The clerk shall prepare, sign and enter the following without submission to the court or a judge unless otherwise directed:

(7) Orders dismissing appeals in all cases where a brief for the appellant has not been filed within nine months of the docketing of the appeal and no stipulation extending the time for such filing has been filed.